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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

EERIK HEINE, *Petitioner*

against

JURI RAUS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner, Eerik Heine, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the Orders of the United States District Court for the District of Maryland, granting

summary judgment against the petitioner in his slander action for money damages.

OPINIONS BELOW

This case has been before the Fourth Circuit Court of Appeals on two occasions. Initially, the District Court entered summary judgment against the petitioner on his slander action for money damages against the respondent, and the opinion of the District Court is reported in *Heine* v. *Raus,* 261 F.Supp. 570 (D.Md. 1966). The Court of Appeals, in an unanimous opinion, reversed the summary judgment entered by the District Court and remanded the case to the District Court for further factual development of an issue, with Chief Circuit Judge Haynsworth and Circuit Judge Boreman joining in an opinion in sharp contrast to a concurring opinion by Circuit Judge Craven. The opinion of the Court of Appeals is recorded in *Heine* v. *Raus,* 399 F.2d 785 (4th Cir. 1968). Thereafter, on remand, Chief Judge Thomsen made the limited inquiry previously directed by the Court of Appeals and then re-entered summary judgment against the petitioner. His opinion is reported in *Heine* v. *Raus,* 305 F.Supp. 816 (D.Md. 1969). Thereafter, the Court of Appeals reconsidered the case on the narrow issue on which it had remanded, and affirmed the order of the District Court in a *per curiam* opinion. The *per curiam* opinion is not yet reported and is reprinted herein in Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the United States Court of Appeals for the Fourth Circuit was entered on October 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF QUESTIONS PRESENTED

1. Whether the judicially developed doctrine of executive immunity as enunciated by this Court in *Barr* v. *Matteo* extends to immunize respondent from petitioner's slander suit for money damages when respondent admittedly called petitioner a KGB agent and a dispatched Soviet intelligence operative, when said defense was asserted on his behalf by the CIA, but under circumstances where the CIA also invoked a Claim of Privilege asserting state secrets so that petitioner was precluded from making specific inquiry into respondent's niche in the federal hierarchy or the scope of respondent's employment or outer perimeter of his duties with the CIA.

2. Whether the judicially developed doctrine of executive immunity as enunciated in *Barr* v. *Matteo* by this Court extends to and immunizes respondent from suit when the defamation is intentional and made as an instrument of government policy by the CIA under color of its statutory authority in 50 U.S.C.A. § 403(d)(3) and § 403g, when said statutory authority relied on contains a specific prohibition against any internal security functions together with a mandate to protect the intelligence sources from unauthorized disclosure from within the intelligence community.

3. Whether summary judgment for the respondent should have been granted by the District Court in an action for money damages for slander where the defense of absolute immunity asserted by respondent could meet neither the testimonial requirements of Rule 56(e) F.R.C.P. nor the standards set forth by this Court in *Barr* v. *Matteo,* because the CIA filed a Claim of Privilege asserting secrecy which precluded any specific inquiry into respondent's relationship, duties or employment with the CIA.

STATEMENT OF THE CASE

The serious and substantial questions raised in this appeal arise out of the factual context of slanders issued to persons in the United States by the respondent under the color of authority by an erroneous construction of the statutory authority of the Central Intelligence Agency, and purportedly with executive immunity, under an unwarranted extension of the judicially developed doctrine of executive immunity as developed by this Court in *Barr* v. *Matteo,* and the further granting of a summary judgment for the respondent contrary to Rule 56 F.R.C.P. in the Rules of Evidence.

A. STATEMENT OF THE FACTS

1. The Facts Preceding the Institution of the Present Action for Money Damages for Slander

Petitioner, Eerik Heine, was a resident of Rexdale, Ontario, and a citizen of Canada. He enjoyed a good reputation generally and more particularly for his stand against communists and communism. (J.A. 19) During 1963 he lectured and exhibited a motion picture to Estonian groups in Canada and the United States. (J.A. 20)

He exhibited a motion picture which he had produced and directed entitled "Creators of Legend" and lectured on his experiences as a prisoner in Russian prison camps and on his guerrilla fighter activities in occupied Estonia. Heine partially earned his livelihood from the lectures and motion picture which were heard and seen by thousands of people of Estonian extraction, and others. The lectures and the picture were well received because Heine, an Estonian by birth, was well known for his vigorous anti-communist activities. (J.A. 20)

Respondent, Juri Raus, was a resident of Hyattsville, Maryland, and a citizen of the United States. At all times herein mentioned, he was a highway research engineer with the Bureau of Public Roads, Department of Commerce of Washington, D. C. (J.A. 26) On November 9, 1963, in New York, at a special board meeting of an Estonian organization, Raus made a statement that Eerik Heine was a KGB agent, meaning that Heine was a Soviet agent or collaborator. (J.A. 126) Subsequently, on July 4, 1964, and on September 4, 1964, at Estonian gatherings in Pasadena, Maryland, and in Baltimore, Maryland, respectively, Raus made substantially the same statements about Heine to one August Kuklane, an officer in the Baltimore branch of an Estonian organization. (J.A. 130)

These accusations by Raus, a person of apparent responsibility and position in the Estonian community, caused Heine to be brought into general scandal and disgrace in the United States and in Canada, both in the Estonian and general communities, and caused him injury and damage to his good name and reputation. (J.A. 22)

Petitioner's slander action for money damages follows.

2. The Initiation of the Present Complaint

Petitioner Heine filed a slander suit against Raus in November, 1964, alleging all the material matters as above stated, including the allegations that Raus had maliciously defamed him, as mentioned, on three separate occasions. Heine claimed general damages of $10,000 and punitive damages for malice in the amount of $100,000. (J.A. 23)

Raus filed an answer in January 1965, admitting that on November 9, 1963, he made a statement in New York that Heine was a Soviet agent or collaborator, and he admitted having spoken to one August Kuklane, in substantially the same terms, but on an occasion earlier than those specified in the complaint. Raus denied making the statements attributed to him as specified in the latter two instances in the complaint. In his answer, Raus set up the defenses of qualified privilege, free speech, and the defense of limitations respecting a communication to Kuklane. (J.A. 24)

Respondent also alleged that he was acting as an appropriate officer of the Estonian liberation movement and that Heine's suit was contrary to the interest and public policy of the United States. (J.A. 25)

B. PROCEEDINGS BELOW

1. Proceedings in the District Court

Thereafter, in February of 1965, Raus' attorneys took a 924-page deposition of Heine. (J.A. 28-30) In November, 1965, petitioner served 424 interrogatories on Raus. (J.A. 31-98) In January, 1966, respondent filed a motion to strike the interrogatories on the ground that the number was oppressive and on the ground that the interrogatories inquired of privileged matter. (J.A. 98)

Contemporaneously, the respondent filed a motion for summary judgment founded upon the affirmative defense of absolute privilege, and based upon an affidavit of the Deputy Director of Central Intelligence which stated, in substance, that "on those occasions specified in paragraphs 5, 6, and 7 of the complaint, the defendant, Juri Raus, was in possession of information furnished to him by the Central Intelligence Agency,

and when he spoke concerning the plaintiff on such occasions he was acting within the scope and course of his employment by the Agency on behalf of the United States." (J.A. 107)

Thereafter, on March 11, 1966, the District Court held a hearing on the respondent's motion for summary judgment and ruled that the answer did not set up the defense of absolute privilege but granted respondent leave to file an amended answer asserting that defense. (J.A. 168) The District Court also ruled that the respondent should not be required to answer the 424 interrogatories propounded, but that the petitioner might take the deposition of the respondent. (J.A. 4-5) At the hearing of March 11, the District Court also stated, after argument by counsel, that a more detailed affidavit should be filed by the Deputy Director of the Central Intelligence Agency. The District Court then advised counsel for the respondent that the Government should be present to assert any privilege against disclosing secrets. (J.A. 159) Subsequent hearings were had on April 14, 1966, on April 28, 1966, on May 13, 1966, and finally on September 28, 1966. During this period of time, and because petitioner continuously complained of the allegedly conclusory nature of the Deputy Director's affidavits, three successive affidavits were filed after the first, each with additional detail, but still objected to by the petitioner. (J.A. 118) Argument was heard by the District Court on the respondent's motion for summary judgment at each of the hearings, except that on April 28, 1966, the petitioner took the deposition of the respondent in open court. (J.A. 249) Petitioner's counsel advised the District Court that the principal purpose of the deposition was to ascer-

tain Raus' connection with the CIA and to explore the defense of official immunity. (J.A. 246-7) Present at the deposition, were three attorneys representing the United States in addition to petitioner and respondent's counsel. (J.A. 236) Prior to the taking of the deposition, a formal Claim of Privilege was lodged with the District Court on behalf of the Central Intelligence Agency and over the signature of the Director. (J.A. 234)

Both sides filed several briefs on the questions involved during the months between the first and final hearing on the respondent's summary judgment motion. At the final hearing, the District Court ruled on petitioner's motion to strike the amended answer which had been pending for several months, and denied the same. (J.A. 354)

The District Court took the rest of the case under advisement, and issued an opinion granting the respondent's motion for summary judgment on December 8, 1966. (J.A. 1) The first appeal followed.

2. Proceedings in the United States Court of Appeals for the Fourth Circuit in No. 11,195

The Court of Appeals vacated the summary judgment entered for the respondent by the District Court and remanded the case on the ground that there was a permissible inference in the record before it "that the instructions (to Juri Raus to speak of the petitioner as he did) were given by an unauthorized underling and that his action has never had the approval of a responsible official of the Agency having authority to issue or approve such instructions." 399 F.2d 785 (1968).

The Fourth Circuit further stated:

> ". . . if the plaintiff represents to the District Court serious reliance upon the inference, further inquiry may be had and additional findings made. The inquiry should be directed to the identity of the official within the Agency who authorized or approved the instructions to Raus. Disclosure of the identity of the individual who dealt with Raus is not required; the answer to be sought is whether or not the Director or a Deputy Director or a subordinate official, having authority to do so, authorized, approved or ratified the instructions."

3. Proceedings in the District Court After Remand

After remand, petitioner filed a statement with the Court representing to the District Court serious reliance upon the inference referred to in the Opinion of the Fourth Circuit, and the petitioner requested that further inquiry may be had into said inference and that additional findings be made.

Thereafter, the Court denied petitioner's request to depose the Director of the CIA, and alternatively, directed the petitioner to submit questions on the general areas on which petitioner proposed to depose the Director. Petitioner filed thirty-five (35) general questions and the Court considered the same *seriatum* and heard arguments of counsel thereon. Thereupon, subject to a further report from the United States as to whether the Director of the Central Intelligence Agency would file a claim of privilege against the disclosure of state's secrets with respect to any of the proposed questions, and reserving the ruling on the Claim of Privilege as to each of the said proposed general questions, the Court ruled that thirteen (13) of the petitioner's general questions were within the

inquiry directed under the remand of the Court of Appeals; and that two (2) of the questions were to be re-examined in the light of any response which the Director might make to the general area of questioning in response to one of the allowed questions. Respondent's objections to the remaining questions were sustained.

Subsequently, the Court was advised by the Government that the United States strongly opposed the taking of the deposition of the Director of the Central Intelligence Agency, but that subject of the Claim of Privilege, the Director would respond in writing to the questions which the Court ruled to be relevant. The Director made partial answers to three of the allowed questions, and he firmly asserted the privilege status of further answers to said questions and declined to give further information to the same pursuant to the authority vested in him as Director of Central Intelligence. All other questions were answered without any Claim of Privilege.

During the course of this remand proceeding, the respondent had renewed his motion for summary judgment buttressed by another supporting affidavit by the Director of Central Intelligence.

The District Court held a final hearing in which the petitioner urged the Court to permit the taking of the Director's deposition so that the Director could be cross-examined both on the statements and answers in which he claimed privilege and also on the questions where privilege was not claimed. Respondent argued that the Claims of Privilege made in the answers to the written interrogatories would have to be sustained on oral deposition and that the Director had given all of

the information which could be obtained, both in his affidavits and the answers which he had made under oath.

Thereupon, the Court directed that summary judgment be re-entered in favor of the respondent against the petitioner and the District Court rendered an opinion holding that Helms' Claim of Privilege must be sustained under the rule announced in *United States* v. *Reynolds,* 345 U.S. 1. The Court held that the Director's affidavit supported by his answers to the interrogatories, shows:

> "(a) that the instructions to Raus were given by a subordinate official of the Agency, authorized to do so, and acting in the course of his prescribed duties and not by an unauthorized underling; and
>
> (b) that Helms, as Deputy Director of the Agency in December, 1964, was authorized to and did ratify and approve the action taken by the counterintelligence officer who instructed Juri Raus to warn members of the Estonian emigre groups that Eerik Heine was a Soviet intelligence operative, a KGB agent." *Heine* v. *Raus,* 305 F. Supp. 816 (D. Md. 1969)

The second appeal followed.

4. Proceedings in the Court of Appeals After Remand in No. 14,281

Upon the conclusion of the remand proceedings, the District Court re-entered summary judgment against the petitioner. The Court of Appeals affirmed the action of the District Court in a *per curiam* opinion, holding that the District Court had fairly resolved the question of authority and ratification left open by its prior decision, *Heine* v. *Raus,* 399 F.2d 785 (4th Cir. 1968).

REASONS FOR GRANTING THE WRIT

1. The doctrine allowing the Director of the CIA to assert the claim of state secrecy should be carefully examined by this Court, not for the purpose of narrowing the area of its use as a shield but to prevent its use as a sword.

The District Court wrongly granted the respondent's motion for summary judgment despite the fact that the respondent was unable to show the facts pertinent to the central issue upon which his motion was based. It was necessary for the respondent in order to avail himself of governmental immunity from suit developed by *Barr* v. *Matteo,* 360 U.S. 564 (1959) to show the fact that he was a employee of CIA and that he was within the scope of his duties at the time he called the petitioner a communist and a KGB agent.

The respondent was unable to produce such facts to substantiate his claim of government immunity.

The CIA had asserted its Claim of Privilege of secrecy to withhold the facts of the respondent's employment, stating to do so would jeopardize national security. Therefore, the respondent produced no facts as required by Rule 56(e) of the Federal Rules of Civil Procedure, but only submitted conclusory affidavits which usurped the province of the Court in asserting that respondent Raus was acting within the scope of his employment by CIA when he issued his maledictions about the petitioner.

The District Court, in its opinion, wrongly and arbitrarily decided that as a result of the inability of the respondent to establish the truth of his allegations of his own alleged employment and scope of employment with the CIA, that not the respondent, but, amazingly,

the petitioner must suffer. For some arbitrary and inexplicable reason, the Court chose, erroneously, to confer a special grace upon totally inadmissible evidence in the affidavits and the deposition by virtue of the fact that secrecy prevented cross-examination. As was urged by the petitioner to the District Court in argument repeatedly, before the entry of the first summary judgment, the interposition of secrecy is not partisan. Secrecy falls like an impenetrable curtain neither adding dignity to that which is permissibly discoverable nor permitting inferences to be drawn from that which is not discoverable.

Since the respondent had in an earlier affidavit sworn that he was an employee of the Bureau of Public Roads and had no other source of income, there is ample reason to conclude that had the CIA not interposed its claim of secrecy and been forced to reveal the details surrounding its relationship to respondent Raus, that he would not have been able to file his motion which required his being a government employee at the time of the slander.

As a consequence, the claim of state secrecy has been used as a sword and not as a shield; or, more appropriately, in the case of CIA, not as a cloak but as a dagger. Such aggressive use is a palpable abuse and the resultant summary judgment should be reversed for a full trial on the merits.

2. The District Court erred in granting summary judgment for the respondent despite pleadings demonstrating the existence of genuine issues of fact concerning material matters. Conflicts existed between the affidavit of the respondent of January 15, 1965 to the effect that he was a Bureau of Public Roads employee with no other source of income but his Army

Reserve pay and the affidavits of Richard Helms which claimed that respondent was employed by the CIA and acting within the scope of his employment at the time of the defamations.

In addition, there was a direct denial by the respondent of the allegations of the petitioner's complaint which had claimed that respondent had spoken of the petitioner in a defamatory manner to one Kuklane. There were numerous genuine issues of material fact which were never resolved.

There was a violation of the requirements of Rule 56(e) of the Federal Rules of Civil Procedure in that the specific offers of evidence by the respondent were not only conclusory statements on the ultimate issues required to show government immunity but also were not subjected to cross-examination.

The respondent sought, by the revelation of certain information contained in the affidavits of CIA Director Richard Helms, to show that there was no disputed material fact concerning the respondent's status as an employee of the CIA who, supposedly within the scope of his duties, slandered the petitioner, Eerik Heine. Such evidence, if admissible and uncontradicted, would, by virtue of the rule of federal immunity, terminate the lawsuit; however, the respondent's offer of proof failed to satisfy Rule 56(e) F.R.C.P. which requires that affidavits, offered in support of a motion for summary judgment, must present admissible evidence. As was held in *Banco de Espana* v. *Federal Reserve Bank of New York* (CCA 2d 1940), 114 F.2d 438, at 445:

> "A bona fide affidavit to support a summary judgment must necessarily be a statement of facts

> which the moving party, sic, knows and is able to substantiate at trial."

Further, in *Stephan* v. *United States,* 133 F.2d 87 (6th Cir. 1943), the Court, in restricting the general rule on an appeal of a conviction for treason, held:

> "The general rule is that where the witness after his examination-in-chief on the stand has refused to submit to cross examination, the opportunity of thus probing and testing his statements has substantially failed and his direct testimony should be struck out." *Wigmore on Evidence,* Section 1391, page 112, and cases cited in the footnotes.

The general rule is that after a witness, having given his testimony in chief, refuses to submit to cross examination, the opportunity of probing and testing his statements has substantially failed and his direct testimony should be struck out. Summary judgment cannot achieve more than an actual trial would produce. In this case, if the affidavits which support the motion for summary judgment had contained facts and not merely conclusions, which was not the case, the total lack of cross-examination rendered the affidavits inadmissible in support of the motion. In an actual trial, if the author of the affidavits, Richard Helms, CIA Director, took the stand and recited all of the facts in his numerous affidavits and, thereafter, refused to submit to cross-examination, a trial would, following the basic and rudimentary testimonial requirements, be forced to strike all such testimony in chief.

Thus, all of the conclusory statements which foreclosed cross examination should be stricken and summary judgment reversed.

3. The District Court erred in interpreting Title 50 § 403(d) and CIA Regulation HR 10-20 by construing said statute and regulation to mean that the CIA was authorized to protect external intelligence sources, as such, rather than, as the regulation specifically and plainly defined the statute, to mean the internal protection from unauthorized disclosure of intelligence sources within the CIA and other intelligence agencies.

In all of the affidavits filed by the CIA in support of respondent's motion for summary judgment, the Agency cites its authority (J.A. 182) under CIA Regulation HR 10-20 referring to it as an implementing regulation promulgated under 50 U.S.C.A. § 403 (d) and 50 U.S.C.A. § 403 g.

If CIA Regulation HR 10-20 is a valid promulgation of the statutory authority of the Agency respecting the protection of intelligence sources and methods from unauthorized disclosure, then a reading of the same, employing ordinary rules of logic and legal construction, makes it objectively evident and clear, and not susceptible of a contrary interpretation and construction, that the "PROTECTED INFORMATION" as defined in CIA Regulation HR 10-20(b) is information which is "in the offices of the Central Intelligence Agency" and the "POLICY" as defined in paragraph c of said Regulation is a prohibition " . . . from disclosing or using protected information for any purpose other than the performance of duties for or on behalf of the Agency . . . ". (J.A. 183) Accordingly, while the plain meaning of the Regulation can be belabored by argument it cannot be improved thereby, in its specific relevance and reference to its plain intention of protecting *existing* intelligence sources and methods *within the intelligence community* from "unauthorized

disclosure". (J.A. 183) However, this Regulation has been modified in its purport by the cropping of the words "unauthorized disclosure" repeatedly in the affidavits of Richard Helms and the arguments of the respondent and the CIA so that the affidavits and the arguments constantly refer to the protection of foreign intelligence sources, omitting the words "from unauthorized disclosure."

This cropping of the words "from unauthorized disclosure" is employed to change the plain intention of the statute and the Regulation from an internal control within the Intelligence Community to an external and universal control thusly, "so as to protect the integrity of the Agency's foreign intelligence sources." (J.A. 181) This contorted construction relied upon by the CIA expands its statutory authority and, concommittantly, the areas to which the privilege of its executive or official immunity extend. However, the cropping of the words cannot erase the strict prohibition contained in 50 U.S.C.A. § 403(d)(3) against any internal-security functions by the CIA.

On the District Court level, petitioner contended that defense of executive immunity under *Barr* v. *Matteo* was not available to the respondent because the conduct and utterances complained of exceeded the statutory authority of the Agency. Accordingly, it was necessary for the District Court to construe the statutory authority of the CIA before it could immunize the respondent under *Barr*.

However, in so construing the statutory authority of the CIA, the District Court fell victim to and adopted the cropped concept contained in the series of affidavits and other filings made in the case by the CIA, thereby

confusing the entirely dissimilar concepts of "to protect its foreign intelligence sources" with "to protect its foreign intelligence sources from unauthorized disclosure". This is patently obvious from reading part of the Court's opinion construing the statute:

> "It is reasonable that emigre groups from behind the Iron Curtain would be a valuable source of intelligence information as to what goes on in their old homeland. The fact that the immediate intelligence source is located in the United States does not make it an 'internal security function', over which the CIA has no authority. The Court concludes that activities by the CIA to protect its foreign intelligence sources located in the United States are within the power granted by Congress to the CIA." (J.A. 13)

This explanation about the emigre groups was never advanced by the CIA, never uttered by respondent Raus, and never claimed in any of the affidavits of Richard Helms; however, the Court, *sua sponte,* arrived at this full explanation, nothwithstanding the strictures of Rule 56 F.R.C.P. requiring that all permissible inferences be drawn to favor the party opposing the motion for summary judgment.

4. There should be a re-examination of the rule of *Barr* v. *Matteo* which was the opinion of a sharply divided court. A most intense re-examination should be made of the intentional, calculated, and deliberate use of defamation for the very purpose of destroying the influence and effectiveness of an individual. As Judge Craven stated in his concurring opinion in the remand to the District Court,

> "*Barr* was not intended to protect the oppressive use of governmental power. Nor was the rule in

> *Barr* formulated for the protection of the 'unworthy' officer of government. The protection afforded such an officer was given to him, not because he deserved to have it, but because of fear that if he was denied it, there might result a deterrent effect upon honest and well intentioned officers of government that would hamper government operation . . . *Barr* envisioned defamation and possible slander as the occasional failures of fallible human beings acting as government officers and not as instruments of government policy. I think the immunity conferred in *Barr* has no application to a fact situation where defamation is chosen by a government agency as deliberate policy." *Heine* v. *Raus,* 399 F.2d 785 (1968).

If the decision stands, a fail-safe system for character assassination has been perfected. By a judicious use of the privilege against the disclosure of state secrets and its amalgamation with the immunity from suit enjoyed by governmental officers, an individual can be attacked and vilified without sanction. But an added advantage can accrue to the author of the policy producing the devious plot: his identity need not be disclosed to view. The calculated and synchronous use of the cloak and dagger may be a way of life in totalitarian countries but is completely abhorrent in a free society.

Our society has remained free because a great principle of government has been kept alive throughout the history of our country which was first stated so eloquently in *Marbury* v. *Madison,* one of the earliest great decisions of this Court, when it said: "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation

if the laws furnish no remedy for the violation of a vested legal right."

In reversing the judgment entered below, this Court would be giving new expression to this ancient principle of government.

CONCLUSION

The Petition for the Writ of Certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14,281

EERIK HEINE, *Appellant,*

versus

JURI RAUS, *Appellee.*

Appeal from the United States District Court for the District of Maryland, at Baltimore. Roszel C. Thomsen, Chief District Judge.

Argued October 9, 1970 Decided October 30, 1970

Before HAYNSWORTH, Chief Judge, WINTER, and CRAVEN, Circuit Judges.

Robert J. Stanford and Ernest C. Raskauskas for Appellant, and Paul R. Connolly (J. Alan Galbraith, and Williams & Connolly; E. Barrett Prettyman, Jr., and Hogan & Hartson on brief) for Appellee.

PER CURIAM:

On remand the district court fairly resolved the question of authority and ratification left open by our prior decision, *Heine* v. *Raus,* 399 F. 2d 785 (4th Cir. 1968). Thereupon he entered summary judgment in accordance with the law of the case.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 15952

EERIK HEINE

v.

JURI RAUS

Filed: November 3, 1969

Ernest C. Raskauskas and Robert J. Stanford, of Washington, D. C., for plaintiff.

Paul R. Connolly, E. Barrett Prettyman, Jr., and Hogan & Hartson, of Washington, D. C., for defendant.

Lawrence R. Houston, General Counsel, Central Intelligence Agency, and Kevin T. Maroney, Attorney, Department of Justice, of Washington, D. C., and Stephen H. Sachs, United States Attorney, and Barnet D. Skolnik, Assistant United States Attorney, of Baltimore, Maryland, for the United States.

THOMSEN, Chief Judge

In this action for slander, defendant asserted the defense of absolute privilege on the ground that when he made certain defamatory statements he was acting within the scope and course of his employment by the Central Intelligence Agency on behalf of the United States, and had been instructed by the CIA to warn members of Estonian emigre groups that plaintiff was a dispatched Soviet intelligence operative, a KGB agent.

After various proceedings, detailed in the previous opinion of this Court, 261 F. Supp. 570 (1966), and for the reasons set out therein, this Court granted defendant's motion for summary judgment.

On appeal, the Fourth Circuit vacated the judgment and remanded the case for the narrow purpose set out in its opinion, 399 F. 2d 785 (1968).

After summarizing the proceedings in this Court, the Fourth Circuit said: "It [the District Court] was of the opinion that the absolute governmental privilege was available to a government employee such as Raus, who faithfully executed his instructions, as to one of higher authority exercising discretionary functions within the outer perimeter of his authority. We agree, provided the instructions were issued by one having authority to issue them." 399 F. 2d at 788.

The Fourth Circuit quoted the discussion of the government's privilege of silence with respect to "state secrets", contained in *United States* v. *Reynolds,* 345 U.S. 1, 7-8 (1953), and said: "We affirm the right of the CIA in this case to invoke the governmental privilege agains' disclosure of state secrets and its allowance, to the extent it was allowed, by the District Court." 399 F.2d at 788.

The Fourth Circuit continued: "On the question of executive privilege in defamation suits, we also agree generally with the District Court, its analysis of *Barr* v. *Matteo* [360 U.S. 546] and its reasoning, though we come to the conclusion that one more detail should have been supplied before entry of summary judgment."

After a full discussion of the reasons which led to its conclusion, the Fourth Circuit said:

> "We conclude that the absolute privilege is available to Raus if his instructions were issued with the approval of the Director or of a subordinate authorized by the Director, in the subordinate's discretion, to issue such instructions, or if the giving of the instructions was subsequently ratified and approved by such an official.

"Though the Director's affidavits state that Raus acted under instructions of the CIA, which certainly strongly implies that the instructions were given by, or with the approval of, a responsible, authorized official of the Agency and though the Director's appearance in the case carries with it a strong implication of his personal ratification and approval, it is said that on the present record there is still a permissible inference that the instructions were given by an unauthorized underling and that his action has never had the approval of a responsible official of the Agency having authority to issue or approve such instructions. The inference seems unlikely but we cannot say it is foreclosed by the present record.

"Since summary judgment was issued, we will vacate the judgment so that, if the plaintiff represents to the District Court serious reliance upon the inference, further inquiry may be had and additional findings made. The inquiry should be directed to the identity of the official within the Agency who authorized or approved the instructions to Raus. Disclosure of the identity of the individual who dealt with Raus is not required; the answer to be sought is whether or not the Director or a Deputy Director or a subordinate official, having authority to do so, authorized, approved or ratified the instructions. If such disclosures are reasonably thought by the District Judge to violate the claimed privilege for state secrets, they may be made *in camera*, to that extent. Disclosures *in camera* are inconsistent with the normal rights of a plaintiff of inquiry and cross-examination, of course, but if the two interests cannot be reconciled, the interest of the individual litigant must give way to the government's privilege against disclosure of its secrets of state.

"Finally, we may observe that while we generally approve entry of summary judgment for the defend-

ant, subject only to the limited additional inquiry we direct, the plaintiff would fare no better if the defendant's privilege were held to be not absolute, but only qualified. Heine cannot controvert the claim of Raus, supported by the CIA, that he acted under instructions of that Agency. Heine claims no publication exceeding the instructions. He has no basis for a showing of malice. If summary judgment is appropriate after the additional, limited inquiry we direct, it will avoid the necessity of a trial and possible compromise of state secrets which the government is entitled to preserve." 399 F.2d at 791.

Following the remand of the case to this Court, plaintiff stated formally that he "seriously relies upon the inference that the actions and statements of Juri Raus, the defendant, against the plaintiff, were not with the approval of a responsible official of the Agency having authority to issue or approve such instructions". He requested the Court to "permit plaintiff to make further inquiry into said inference, and that additional findings be made".

The Court then held a preliminary conference, at which (1) plaintiff requested that he be permitted to take the deposition of Richard Helms, the Director of the Central Intelligence Agency, in order to establish the factual basis for the inference, and (2) defendant filed an affidavit of the Director, dated February 10, 1969, together with a motion for summary judgment. The Court reviewed the Helms affidavit and suggested that it might be amplified in order to clarify certain statements therein. The defendant and the government agreed to obtain another affidavit from the Director to clarify the questions raised by the Court. At the same hearing the Court directed plaintiff to submit written questions, so that more careful consideration could be given to them both by the Director and by the Court.

On March 19, 1969, plaintiff submitted thirty-five questions on which he wished to take the deposition of the Director. Shortly thereafter defendant filed objections to the proposed questions and an additional affidavit of the Director, dated April 3, 1969, supplementing his affidavit of February 10, 1969. The United States filed a statement on behalf of the Director and the Central Intelligence Agency, advising the Court that it would await the ruling of the Court as to whether any of the proposed questions would be allowed before determining whether or not it would be necessary for the Director to make an official claim of privilege on the ground of secrecy with respect to any of the information sought to be elicited.

On June 6, 1969, a formal hearing was held on defendant's objections to the questions. After argument, and subject to a further report from the United States as to whether the Director would file a claim of privilege against disclosure of state secrets with respect to any of the proposed questions, and reserving ruling on any such claim of privilege, the Court ruled: (1) that certain questions [1] were within the scope of inquiry directed by the Court of Appeals; (2) that two questions [2] would be reexamined in the light of any response which the Director might make in response to question No. 4; and (3) that defendant's objections to other questions [3] should be sustained.

On July 16, 1969, the Court received a letter from J. Walter Yeagley, Esq., Assistant Attorney General of the United States, advising the Court that the United States opposed the suggestion that a deposition upon oral examination be taken of the Director, and that subject to

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[1] Nos. (3), (4), (5), (9), (12), (15), (16), (17), (18), (19), (20), (21), (22) and (29).

[2] Nos. (13) and (14).

[3] Nos. (1), (2), (6), (7), (8), (10), (11), (23), (24), (25), (26), (27), (28), (30), (31), (32), (33), (34) and (35).

the claim of privilege the Director would respond in writing to the questions which the Court had ruled to be relevant, material and proper under the circumstances. On September 29, 1969, the Director responded in writing and under oath to all of the questions allowed by the Court. The Director made partial answers to questions (3), (5) and (12), and with respect to each of them stated that as Director of Central Intelligence, he determined that "it would be contrary to the interests of the security of the foreign intelligence activities of the United States to give further information" on the matters covered by the questions, and formally asserted the privileged status of such information. See footnote 4 for those questions and answers. All other questions were answered without any claim of privilege.

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[4] "Question 3. You state categorically and conclusively that the counterintelligence officer referred to in paragraph 4 of your fifth Affidavit had a certain assigned function and was acting in accordance with his prescribed duties. What was the "assigned function" and what were the "prescribed duties" of the said counterintelligence officer with reference to the statements made by Juri Raus against Eerik Heine?

"*Answer.* As stated in my Affidavit of February 10, 1969, the counterintelligence officer's function and duties, with reference to the statements made by Juri Raus concerning Eerik Heine, were to safeguard the Agency's intelligence sources developed within Estonian emigre groups.

"As Director of Central Intelligence, I determine that it would be contrary to the interests of the security of the foreign intelligence activities of the United States to give further information as to the assigned counterintelligence functions or the prescribed duties of the counterintelligence officer referred to in paragraph 4 of my Affidavit of February 10, 1969, and, accordingly, pursuant to the authority vested in me as Director of Central Intelligence, I formally assert the privileged status of such information and respectfully decline to give further information in answer to question 3."

"Question 5. In paragraph 5 of your fifth Affidavit, you allege that the entire matter was reviewed by you in December of 1964, and then as Deputy Director with responsibility for all Agency counterintelligence operations, you ratified and approved the action

On October 17, 1969, another formal hearing was held, at which plaintiff pressed his request to take the oral deposition of the Director, and defendant argued that the

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taken by the counterintelligence officer who instructed Juri Raus to warn members of the Estonian emigre groups that Eerik Heine was a Soviet Intelligence Operative, a KGB agent. What prior authorization, instruction and legal statutory authority did the mentioned counterintelligence officer have for taking his stated action prior to your subsequent ratification?

"*Answer.* In paragraph 4 of my Affidavit of February 10, 1969, I stated that the counterintelligence officer responsible for safeguarding sources of intelligence developed within Estonian emigre groups, acting in accordance with his prescribed duties, instructed Juri Raus to warn members of Estonian emigre groups that Eerik Heine was a Soviet intelligence operative, a KGB agent.

"As Director of Central Intelligence, I determine that it would be contrary to the interests of the security of the foreign intelligence activities of the United States to give further information concerning the prior authorization or instruction to the counterintelligence officer referred to in paragraph 5 of my Affidavit of February 10, 1969, other than that provided in my answer to question 3, and, accordingly, pursuant to the authority vested in me as Director of Central Intelligence, I formally assert the privileged status of such information and respectfully decline to give further information in answer to question 5."

"Question 12. What was the grade and salary of the counterintelligence officer referred to in paragraph 4 of your fifth Affidavit at the time he instructed Juri Raus to warn members of the Estonian emigre groups that Eerik Heine was a Soviet Intelligence operative, a KGB agent?

"*Answer.* As stated in my answer to question 9, the counterintelligence officer in question was, at all times complained of, a full-time staff employee of the Agency. He was paid annual compensation at a rate in accordance with the Classification Act Amendments of 1962.

"As Director of Central Intelligence, I determine that it would be contrary to the interests of the security of the foreign intelligence activities of the United States to give any information regarding the grade and salary of the counterintelligence officer in question, and, accordingly, pursuant to the authority vested in me as Director of Central Intelligence, I formally assert the privileged status of such information and respectfully decline to give further information in answer to question 12."

answers to the written interrogatories gave all the information which could be obtained by an oral deposition, because the three claims of privilege would have to be sustained on oral depositions.

The Court repeatedly asked counsel for plaintiff what information they wished to obtain in addition to that included in the Director's affidavits, particularly the affidavits of February 10, 1969 and April 2, 1969, and in his answers to those interrogatories which the Court required him to answer. Aside from the matters on which the Director claimed privilege, counsel for plaintiffs did not suggest any other questions, but elected to stand on the record. This Court, therefore, must determine (1) whether the claims of privilege asserted by the Director with respect to three questions were properly asserted, and (2) whether the facts stated in the affidavits and answers to interrogatories meet the requirements specified by the Fourth Circuit for the entry of a summary judgment. See 399 F.2d at 791, quoted above.

The Director's affidavit of February 10, 1969, read in pertinent part as follows (the matter in italics in paragraph 4 was added by the affidavit of April 2, 1969):

> "3. On those occasions specified in paragraphs 5, 6 and 7 of the complaint filed in this action, as a Deputy Director of the Agency, I was charged by the Director of Central Intelligence, with the specific responsibility, among others, for the conduct of the Agency's counterintelligence operations, the purpose of which is to protect intelligence activities, sources and methods against the operations of foreign intelligence services.
>
> "4. Prior to November 9, 1963, this Agency through confidential intelligence sources available to it received certain information concerning Eerik Heine which was analyzed and evaluated by counterintelligence officers responsible to me, who reached the conclusion that Eerik Heine was a dispatched

Soviet intelligence operative, a KGB agent. In the performance of his assigned counterintelligence function, the counterintelligence officer responsible for safeguarding sources of intelligence developed within Estonian emigre groups, acting in accordance with his prescribed duties, instructed Juri Raus to warn members of the Estonian emigre groups that Eerik Heine was a Soviet intelligence operative, a KGB agent. *The counterintelligence officer referred in the second sentence of the said paragraph 4 was one of the counterintelligence officers referred to in the first sentence of that paragraph.*

"5. After initiation of the present suit, the entire matter was reviewed by me personally as a Deputy Director of the Agency. In December 1964, acting in my capacity as the said Deputy Director with responsibility for all Agency counterintelligence operations, I ratified and approved the action taken by the counterintelligence officer who instructed Juri Raus to warn members of the Estonian emigre groups that Eerik Heine was a Soviet intelligence operative, a KGB agent. In so ratifying and approving, I acted pursuant to the authority vested in me by the then Director of Central Intelligence. In my present capacity as Director of Central Intelligence, I now affirm that appropriate authority was vested in the said Deputy Director by the then Director of Central Intelligence to authorize, approve, or ratify the instructions given to Juri Raus. The several affidavits which I have provided the Court in this matter, in my capacity as the Deputy Director of Central Intelligence, were intended as ratification and approval of said instructions.

"6. Aside from identifying my participation in the Agency decisions concerning Eerik Heine, as set forth herein, I have determined, pursuant to my statutory responsibilities as Director of Central Intelligence,

that it would be contrary to the best interests of the United States to disclose the identity of the counter-intelligence officer who instructed Juri Raus as described in paragraph 4 hereof, since such disclosure could either destroy his utility to the Agency or pose a serious hazard to his safety."

The answers to interrogatories which the Court required the Director to answer gave in greater detail the information contained in the affidavits. The three questions with respect to which the Director claimed privilege and his answers to those questions are set out in footnote 4 above.

1. Those claims of privilege must be sustained under the rule announced in *United States* v. *Reynolds*, 345 U.S. 1, 7-8, quoted and followed by the Fourth Circuit in section I of its opinion in this case, 399 F.2d at 788.

2. The Director's affidavit, quoted above, supported by his answers to interrogatories, shows:

(a) that the instructions to Raus were given by a subordinate official of the Agency, authorized to do so, and acting in the course of his prescribed duties and not by an unauthorized underling; and

(b) that Helms, as Deputy Director of the Agency in December, 1964, was authorized to and did ratify and approve the action taken by the counterintelligence officer who instructed Juri Raus to warn members of the Estonian emigre groups that Eerik Heine was a Soviet intelligence operative, a KGB agent.

It is unnecessary to consider whether the reiterated approval of the instructions by Helms as the present Director would be sufficient.

Having made the additional, limited inquiry directed by the Fourth Circuit, this Court concludes that summary judgment should be entered for the defendant.

ROSZEL C. THOMSEN
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 15952

EERIK HEINE

v.

JURI RAUS

Judgment

This action came on for further trial (hearing) before the Court, Honorable ROSZEL C. THOMSEN, Chief Judge, United States District Court, presiding, and the Court having made the additional, limited inquiry directed by the Fourth Circuit,

It is Ordered and Adjudged in accordance with the Opinion of Court, filed on the 3rd day of November, 1969, that summary judgment be entered in favor of the Defendant, Juri Raus, against the Plaintiff, Eerik Heine, for costs.

Dated at Baltimore, Maryland, this 3rd day of November, 1969.

[Filed July 22, 1968]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,195

EERIK HEINE, *Appellant,*

versus

JURI RAUS, *Appellee.*

Appeal from the United States District Court for the District of Maryland, at Baltimore.

ROSZEL C. THOMSEN, District Judge.

(Argued May 31, 1967. Decided July 22, 1968.)

Before HAYNSWORTH, *Chief Judge,* and BOREMAN and CRAVEN, *Circuit Judges.*

ROBERT J. STANFORD and ERNEST C. RASKAUSKAS for Appellant, and

PAUL R. CONNOLLY (Williams & Connolly; E. Barrett Prettyman, Jr., and Hogan & Hartson on brief) for Appellee.

HAYNSWORTH, *Chief Judge:*

In this slander action, the plaintiff appeals from an order of summary judgment entered against him, on the ground of governmental privilege, after a partial disclosure limited by invocation by the Central Intelligence Agency of the governmental privilege against disclosure of state secrets. The controversy, thus partially surfaced, arose

out of the Central Intelligence Agency's intelligence and counterintelligence activities and its attempt to expose the plaintiff as a Soviet KGB agent, a defamation which the plaintiff alleges to be false.

The plaintiff, Eerik Heine, is an Estonian emigré residing in Canada. With an apparent history as a "freedom fighter" in Estonia, he was an occasional lecturer in the United States and an exhibitor of an anti-communist film. As such, he was known to the leaders of Estonian emigrés in the United States and apparently entitled to their confidence.

The defendant, Juri Raus, is also an Estonian emigré. He resides in the United States and is the National Commander of the Legion of Estonian Liberation. He readily admits that he told the Board of Directors of the Legion that he was reliably informed by an official agency of the United States that Heine was a Soviet agent or collaborator and that the Legion should not cooperate with him. This, the plaintiff charges, made his film and his lecture no longer salable and brought him into disgrace in the Estonian communities in the United States and Canada.

In his initial answer, Raus claimed only a qualified privilege. He claimed that he had spoken, without malice, only as an officer of the Legion and only on privileged occasions to privileged persons. There was no indication of any involvement of the CIA. Later, however, an amended answer was tendered, supported by a series of affidavits executed by the Director or Deputy Director of the CIA, in which the absolute executive privilege was claimed. In those documents it was alleged that Raus was an undercover or secret agent of the CIA,[1] had executed special assignments for it in the past and acted under the instructions of the CIA when he "warned" his

[1] His overt employment was in the Bureau of Public Roads in Washington.

fellow Legionnaires that Heine was a Soviet agent. Earlier disclosure of these circumstances was said to have been prevented by a CIA secrecy agreement, to which Raus had subscribed and which purported to carry with it punishment for violations under 18 U.S.C.A. §§ 793 and 794, including life imprisonment or death. When the first answer was filed, counsel for the CIA had refused permission to Raus to disclose his CIA connection.

Thereafter, the plaintiff sought to take Raus' deposition in order to obtain additional information about his employment by the CIA. The Director of the CIA, through his General Counsel, appeared for the taking of the deposition,[2] and, on a question by question basis, in the presence of the Judge, invoked the government's privilege against disclosure of state secrets. Raus was allowed to state that he had been paid, directly or indirectly, for services he had rendered the CIA, but the privilege was sustained to prevent probing of the details of his employment.

Otherwise, it appears from affidavits of the Director of the CIA that Raus and other Estonian emigrés in the United States had been sources of foreign intelligence and that the purpose of the instruction to Raus to discredit Heine was to protect the integrity of the CIA's sources of foreign intelligence within Estonian emigré groups or developed through them.

In that state of the litigation, the District Court granted a motion for summary judgment.[3] It was of the opinion that the absolute governmental privilege was available to a government employee such as Raus, who faithfully executed his instructions, as to one of higher authority exercising discretionary functions within the outer perim-

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[2] Earlier, in an affidavit, the Director, himself, had sought to invoke the secrecy privilege generally as to any information in addition to that disclosed in the affidavits.

[3] Heine v. Raus, D.C. Md., 261 F. Supp. 570.

eter of his authority.[4] We agree, provided the instructions were issued by one having authority to issue them.

I

At the outset it is well to put to one side the question of the CIA's right to invoke the government's privilege of silence with respect to "state secrets."

"The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. The latter requirement is the only one which presents real difficulty." *United States* v. *Reynolds,* 345 U.S. 1, 7-8 (1953).

The District Court was quite correct in its allowance of the governmental claim of the privilege of secrecy. It was properly invoked generally by the Director of the CIA. The Court made sufficient inquiry—some of it *in camera*—to assure that it had not been done lightly, without pressing so far as to reveal the very state secrets the privilege is intended to protect. When the deposition of Raus was taken, he ruled upon each question calling for information arguably within the privilege, requiring Raus to answer those which the Court thought would not impair the privilege while foreclosing answers to those questions which apparently would. In his conduct of the proceedings, we think he balanced, as fairly as possible, the conflicting interests and was faithful to the "formula of compromise" taught by *Reynolds.*

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[4] Barr v. Matteo, 360 U.S. 564; Howard v. Lyons, 360 U.S. 593.

We affirm the right of the CIA in this case to invoke the governmental privilege against disclosure of state secrets and its allowance, to the extent it was allowed, by the District Court.[5]

II

On the question of executive privilege in defamation suits, we also agree generally with the District Court, its analysis of *Barr* v. *Matteo* and its reasoning, though we come to the conclusion that one more detail should have been supplied before entry of summary judgment.

In *Barr* v. *Matteo,* it was held that the Acting Director of the Office of Rent Stabilization was entitled to the protection of the absolute executive privilege. Responding to congressional criticism of the agency, Barr issued a press release announcing his intention to suspend two subordinate officials and placing upon their shoulders responsibility for the payouts under criticism. Three justices joined Mr. Justice Harlan in the leading opinion in which the governmental interest in having officials, exercising discretionary authority, assured freedom to act in the interest of the agency without fear of having to defend actions for defamation was balanced against the interest of the individual plaintiffs in seeking judicial reha' ation of their reputations. With reliance upon the analysis and justification of Judge Learned Hand in *Gregorie* v. *Biddle,* 2 Cir., 177 F.2d 579, 581, quoted also by the District Court in its opinion in this case, preference was given to the governmental interest. Mr. Justice Black, emphasizing the interest of the public in being informed of such matters, concurred. Mr. Justice Stewart agreed with the analysis of the leading opinion, but dis-

[5] In addition to requiring Raus to answer some questions, the District Court rejected the first affidavits of the Director of the CIA as insufficient to support the claim of absolute governmental privilege. As a result, additional affidavits containing additional information were filed.

sented because he thought Barr had acted to save his own hide by diverting criticism from himself to the plaintiffs, and not in the interest of the agency. The Chief Justice and Justices Douglas and Brennan dissented generally on the ground that the absolute executive privilege should be limited to the President and cabinet officers [6] and, possibly, other appointed officials directly responsible to the President.

If "*Barr* v. *Matteo* extended the earlier decisions of this Court to what I and others considered to be the breaking point," as Mr. Chief Justice Warren observed when dissenting from the denial of a writ of certiorari in *Becker* v. *Philco Corp.*, 389 U.S. 979, 980, this case is much closer to the earlier precedents if we assume that the actor was the Director, himself.

Unlike Mr. Barr, the Director of the CIA is appointed by the President of the United States with the advice and consent of the Senate. He is responsible to the President through the National Security Council. His office is not of Cabinet rank, but it is a highly sensitive position. Necessarily, the Director must work in close collaboration with the President, himself, and with such cabinet officers as the Secretary of State and the Secretary of Defense. He is closer by far to the White House than an acting Director of Rent Stabilization, a subordinate official under the Director of Economic Stabilization.

In *Barr* v. *Matteo*, too, there was room for Mr. Justice Stewart's view that Barr acted not so much to protect the agency from criticism as to divert the criticism from his shoulders to those of his two subordinates. Here, in contrast, we have no such possibility. While we cannot penetrate the cloak of secrecy which surrounds the CIA, there is no reason to suppose the defamation had any relation to the Director's personal career or his reputation

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[6] See Spalding v. Vilas, 161 U.S. 483.

or to those of his subordinates. For all that appears, it was done entirely out of consideration of the national interest.

The CIA and its Director are specifically charged with the duty and responsibility of protecting sources of foreign intelligence and methods of collecting such intelligence from unauthorized disclosure.[7] That aliens within this country are sources of foreign intelligence, as claimed by the Director, has been recognized by the Congress. If the Director determines that an alien's entry for permanent residence in the United States is in the interest of national security or essential to the Agency's intelligence mission, the entry of the alien and his family is allowed though they would be otherwise inadmissible.[8] Unlike Barr, who acted under no direction or specific authorization to issue press releases, action here to protect the integrity of sources of foreign intelligence was explicitly directed by Congress.

If it be said that the defamation here was deliberate, and it was, it was no more deliberate than the defamation in *Barr* v. *Matteo,* and its purpose was loftier. While the veil of secrecy hampers our appraisal of the situation confronting the CIA, enough appears to relate the defamation to governmental interests.

The Director has sworn in his affidavits that Raus and other Estonian emigrés in this country had been sources of foreign intelligence and that other sources of such intelligence had been developed through them. Plainly implicit in the Director's affidavits and the testimony is the receipt by the CIA of information, believed reliable, that Heine was a secret Soviet agent. Such agents do not wear the guise of their masters and if one could successfully infiltrate the Estonian emigré sources in this country

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[7] 50 U.S.C.A. §§ 403(d)(3), 403 g.

[8] 50 U.S.C.A. § 403 h.

he could expect to discover the foreign sources of intelligence developed through them. In such circumstances, is the CIA to seek an indictment on charges it cannot prove if the sources of its information are its own secret agents in the Soviet Republic? Is it to sit idly by, suffering a pollution of the reliability of its sources of foreign intelligence and the intimidation, arrest and persecution of its foreign agents? Or can it protect its sources of information, as required by the statute, by "warning" its own sources that the infiltrator is, or may be, a Soviet agent? In a sensitive area, closely touching national defense, the latter choice seems the one demanded by the national interest, notwithstanding the devastating impact of the warning upon the one thus accused of espionage. While the effect of the defamation upon the plaintiff here may have been greater than the harm suffered by the plaintiffs in *Barr* v. *Matteo,* the relation of the defamation to the national interest is much closer.

While the claim of secrecy prevents our obtaining a clear view of the entire scene, the Director's sworn, but undocumented, claims are enough to support the claim of governmental privilege. That ought to be enough when the statements are those of an official in so responsible an office and a requirement of further documentation and elaboration would violate the privilege of state secrets or greatly burden its exercise.

Thus far, our analysis of the problem is deficient, for we have assumed that the Director, himself, was the author of the defamation. The present record does not show that he was, though it is certainly inferable that the instructions to Raus were given by one having authority from the Director to issue them. In appraising this case in comparison with *Barr* v. *Matteo,* however, it has been useful to start with the assumption that the Director, himself, uttered the defamation, for it should follow, as of course, that the subordinate who acts with the authorization of the

superior is entitled to claim the same privilege as the superior.

If, in defamation cases, recognition of an absolute privilege for judges, legislators and highly placed executive officers of the government, when acting in line of duty, is to serve its intended purpose, it must extend to subordinate officials and employees who execute the official's orders. There would be little purpose to a cloak of immunity for Mr. Barr if Mr. Matteo were allowed to maintain an action for defamation against all of those subordinates in his office who "published" the defamation in the course of handling and distributing the press release. There would be no advantage in protection to a judge against actions for defamation founded upon statements made by him in an official opinion written for his court, if such actions could readily be maintained against his secretary who, at his direction, typed and transmitted the opinion, or against the clerk of the court who published it publicly. If the circumstances impose a compelling moral obligation upon the superior to defend and indemnify the subordinates, immunization of the superior alone from direct defamation actions would be a useless formalism.

Recognition of an absolute privilege of the subordinate by attribution of the superior thus appears to be a necessary corollary of the superior's privilege. It is generally recognized that an agent, acting within the scope of his authority, does have whatever privilege the principal would have enjoyed if he had acted for himself.[9] The principle is applicable in defamation actions[10] and, if an authorized agent would have been privileged, subsequent ratification confers the privilege upon an unauthorized agent.[11] Applicability of the principle to this case has

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[9] Restatement (Second), Agency § 345 (1958).

[10] Ibid. Illustration 2.

[11] Ibid. Comment (e).

been suggested in an article generally critical of the District Court's decision.[12]

We conclude that the absolute privilege is available to Raus if his instructions were issued with the approval of the Director or of a subordinate authorized by the Director, in the subordinate's discretion, to issue such instructions, or if the giving of the instructions was subsequently ratified and approved by such an official.

Though the Director's affidavits state that Raus acted under instructions of the CIA, which certainly strongly implies that the instructions were given by, or with the approval of, a responsible, authorized official of the Agency and though the Director's appearance in the case carries with it a strong implication of his personal ratification and approval, it is said that on the present record there is still a permissible inference that the instructions were given by an unauthorized underling and that his action has never had the approval of a responsible official of the Agency having authority to issue or approve such instructions. The inference seems unlikely, but we cannot say it is foreclosed by the present record.

Since summary judgment was issued, we will vacate the judgment so that, if the plaintiff represents to the District Court serious reliance upon the inference, further inquiry may be had and additional findings made. The inquiry should be directed to the identity of the official within the Agency who authorized or approved the instructions to Raus. Disclosure of the identity of the individual who dealt with Raus is not required; the answer to be sought is whether or not the Director or a Deputy Director or a subordinate official, having authority to do so, authorized, approved or ratified the instructions. If such disclosures are reasonably thought by the District Judge to violate

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[12] Spying and Slandering: An Absolute Privilege for the CIA Agent? 67 Col. L.Rev. 752.

the claimed privilege for state secrets, they may be made *in camera,* to that extent. Disclosures *in camera* are inconsistent with the normal rights of a plaintiff of inquiry and cross-examination, of course, but if the two interests cannot be reconciled, the interest of the individual litigant must give way to the government's privilege against disclosure of its secrets of state.

Finally, we may observe that while we generally approve entry of summary judgment for the defendant, subject only to the limited additional inquiry we direct, the plaintiff would fare no better if the defendant's privilege were held to be not absolute, but only qualified. Heine cannot controvert the claim of Raus, supported by the CIA, that he acted under instructions of that Agency.[13] Heine claims no publication exceeding the instructions. He has no basis for a showing of malice. If summary judgment is appropriate after the additional, limited inquiry we direct, it will avoid the necessity of a trial and possible compromise of state secrets which the government is entitled to preserve.

Vacated and remanded.

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[13] Here, it would matter not if the instructions were unauthorized within the Agency as long as Raus believed them to be.

CRAVEN, Circuit Judge, concurring and dissenting:

I agree with the court that summary judgment was improvidently entered. In addition to the deficiency pointed out by Chief Judge Haynsworth in the majority opinion, I suggest there are others, especially the failure to develop the scope of Raus' duty. Indeed, it seems to me the affidavits and meager information elicited from Raus by deposition are merely conclusory and not at all sufficient to support summary judgment. I believe it error to accept general assertions[1] as a basis for summary judgment where the opposing party is without access to information normally available to test the affidavits because of the invocation of the state secrets privilege. *Cf.* Fed. R. Civ. P. 56(f).

The court says that if executive immunity "is to serve its intended purpose, it must extend to subordinate officials and employees who execute the officials' orders." This means that millions of federal employees are accorded absolute immunity from any liability whatsoever for *intentional* defamation either because such employees fall within the definition of "official" or "officer" as defined in *Barr* v. *Matteo,* 360 U.S. 564 (1959), or, like Raus, take orders from those who do. On remand, there is to be no further inquiry as to Raus' "scope of duty." It seems to me the court is assuming[2] that the publication of defamation is within his official duties, or it is holding that so long as he did what he was told to do the privilege extends even to conduct outside the scope of employment. I cannot

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[1] Rule 56(e) contemplates that a sufficient affidavit shall "set forth such facts as would be admissible in evidence."

[2] It is true that Helms' affidavit contains the assertion that Raus was "acting within the scope and course of his employment" and was instructed to publish the defamatory words. Without factual averments, *i.e.*, job description, the statement is simply a legal conclusion, unless one is willing to say employment is always co-extensive with instructions of the employer.

believe that the latter is intended[3] and, therefore, conclude the court must be making the assumption. But the burden of proof is upon Raus to show that he is entitled to executive immunity, and there is no presumption to aid him. Prosser, Torts § 111 at 823 (3rd ed. 1964). Clearly, it seems to me, he has failed to sustain his burden. That he may have failed to do so because of (a) his secrecy agreement with CIA or (b) CIA's invocation of the executive privilege to protect state secrets are appealing factors that furnish no leverage for decision. Raus does not attack the secrecy agreement if, indeed, he could do so. We are agreed that we may not invalidate the state secrecy privilege. If the result be that Raus cannot show that he acted within the scope of his employment and is thus entitled to a derivative privilege, it does not seem to me that the court ought to assume what he cannot establish. To do so is to put upon Heine a burden of proof that is not his and which he cannot possibly sustain: to show that Raus is *not* entitled to executive immunity.

The National Security Act specifically delegates to the *Director,* and not to the Agency, the statutory power relied on by the CIA and the district judge to justify the defamatory statements, and the affidavits do not suggest that the Director personally instructed Raus to defame Heine, nor is there any showing that the Director approved the defa-

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[3] If Raus had shot Heine, presumably no court would exonerate him of tort liability on the ground he was told to do it—not even for the purpose of shielding the government official who told him. "When 007 plinks an enemy with a well directed projectile from his trusty Walther PPK .32, aficionados give no thought to his possible legal liability; we are all aware that Bond is licensed to kill. In the real world, however, intelligence agents often strike not with guns but with words—allegations that destroy reputations, families, careers. And the question of their responsibility before the law is not nearly so settled as it is in the Fleming phantasmagoria." Comment, *Spying and Slandering: An Absolute Privilege for the CIA Agent?,* 67 Colum. L. Rev. 752 (1967), citing I. Fleming, Goldfinger 29 (1959).

mation of Heine or properly delegated his responsibility to protect intelligence sources.[4] On remand, surely a probing inquiry into this matter can be accomplished without compelling disclosure of "state secrets." I do not view the omission as one sure to be remedied by the filing of another conclusory affidavit.

The court today, it seems to me, extends *Barr* beyond its breaking point. I would not go so far for several reasons, one of which is the court's concession that it is not necessary to do so, and that a qualified privilege would adequately protect the government employee in this case. I agree that such a result seems likely, and I would be content if Raus were accorded only that privilege and Heine given the opportunity to prove, if he can, actual malice.

What distinguishes this case for me from *Barr* and its progeny is the deliberate choice by the Central Intelligence Agency of defamation of character as an instrument of national policy. Such a factor alone seems to me to adequately distinguish *Barr* and all other cases with which I am familiar. I do not believe the Supreme Court in *Barr* intended that the immunity there recognized should extend to intentional defamation as an instrument of governmental policy. But If I am wrong about that, I suggest that a rule must be fashioned to limit the exercise of intentional defamation to responsible officers and officials. To immunize millions of government subordinate employees from liability for intentionally slandering private persons upon their mere explanation that they were told to do it, and the assertion that it was within the scope of employment, destroys, in my opinion, the balance that was struck in *Barr*. If the CIA must defame someone in order to protect national security, it seems to me it could be done more effectively by the Director himself rather than a secret underling—and with far less danger to a free society.

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[4] Helms' affidavit of April 1, 1966, shows a broad delegation of powers to the Deputy Director effective April 28, 1965—long after the defamation of Heine occurred in 1963 and 1964.

Justifying factors found in recent cases where absolute executive immunity has been sustained are not present in this case. *See Spying and Slandering: An Absolute Privilege for the CIA Agent?* 67 Colum. L. Rev. 752, 766-68 (1967). There is here no comment which served the interest of discussion and criticism of government activity or foreign relations. Not involved here are intra-departmental confidential communications necessary to the intelligent functioning of government. Nor is there any possibility here of scrutiny by an alternative remedial procedure in which Heine might vindicate himself or rehabilitate his reputation.[5] The privileges sought by one who is not subject—as are most federal employees—to normal public scrutiny and sanctions for improper conduct. Since Raus was instructed to defame Heine, it is scarcely to be supposed he will be reprimanded by CIA for doing so.

Unlike *Barr* v. *Matteo* and other typical defamation cases, there was here deliberate use of defamatory material, said even now, after the event, to have been authorized by an agency of government (not simply done by an "unworthy" individual employee) for the very purpose of destroying the influence and effectiveness of an individual. *Barr* was not intended to protect the oppressive use of governmental power. Nor was the rule in *Barr* formulated for the protection of the "unworthy" officer of government. The protection afforded such an officer was given to him, not because he deserved to have it, but because of fear that if he was denied it, there might result a deterrent effect upon honest and well intentioned officers of government that would hamper government operation.

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[5] Indeed, Heine presented himself in Washington for arrest on the theory that if he were in fact a Communist, he would be guilty of failing to register under the Federal Foreign Agents Registration Act. 22 U.S.C.A. §§ 611-21 (1964) *as amended* (Supp. 1966). Neither the FBI nor the CIA made any response. N.Y. Times, April 28, 1966, at 29, col. 1; *id.*, April 29, 1966, at 19, col. 1; *id.*, May 14, 1966, at 2, col. 3.

The premise of *Barr* is that because of human foible officers of government may sometimes unfortunately defame innocent individuals and that protection of such an officer is a necessary evil in order to protect worthy officers from the fear of private civil libel actions. *Barr* envisioned defamation and possible slander as the occasional failures of fallible human beings acting as government officers and not as instruments of governmental policy. I think the immunity conferred in *Barr* has no application to a fact situation where defamation is chosen by a government agency as deliberate policy.[6] That CIA may adopt a policy of defamation for the reason that it thinks such a policy is in the best interest of the United States is implicit in the silence of the Federal Tort Claim Act[7] and the undoubted power of the executive to invoke the "state secrets" privilege in a proper case. All that I would hold is that the individual person who publishes such defamation will not thereafter be entitled to *absolute* executive immunity under the doctrine enunciated in *Barr* as I understand it.

I would reverse and remand to the district court to consider whether or not Raus by reason of his position in the Estonian Legion is entitled to assert the qualified privilege commonly granted to those who have a special interest to preserve. *See* Prosser, Torts § 110 (3rd ed. 1964). I would also ask the district court to consider whether Heine was such a public figure as to afford defendant the privilege allowed under *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny. Surely, as the court suggests, one or the other of these ought to be enough.

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[6] *See Comment*, 77 Yale L. J. 367, 387 (1967), where in discussing legislative immunity under U.S. Const. art. I, § 6, it is suggested that a defamed person ought to have "redress against conduct that no rationale for the constitutional privilege purports to justify: the exercise of public power with intent to inflict injury on private citizens or with reckless disregard for their interests."

[7] 28 U.S.C.A. § 2680(h) excludes slander and libel actions.

[Filed December 8, 1966]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 15952

EERIK HEINE

v.

JURI RAUS

Opinion of the Court

Ernest C. Raskauskas and Robert J. Stanford, of Washington, D. C., for plaintiff.

Paul R. Connolly, E. Barrett Prettyman, Jr., and Hogan & Hartson, of Washington, D. C., for defendant.

Lawrence R. Houston, General Counsel, Central Intelligence Agency, of Washington, D. C., and Thomas J. Kenney, United States Attorney, of Baltimore, Maryland, for the United States.

Thomsen, Chief Judge.

This is an action for slander in which defendant's motion for summary judgment asserts the defense of absolute privilege on the ground that when he made certain defamatory statements he was acting within the scope and course of his employment by the Central Intelligence Agency on behalf of the United States, and had been instructed by the CIA to warn members of Estonian emigre groups that plaintiff was a dispatched Soviet intelligence operative, a KGB agent.

Defendant's motion for summary judgment raises a number of substantive and procedural questions. The matter is complicated by the fact that the United States has asserted its privilege against disclosing state secrets.

I.

The complaint, filed in November 1964, alleges that plaintiff, a citizen of Canada, has never been a Communist; that he had been active in various Estonian emigre groups, and had earned part of his livelihood by exhibiting a motion picture, entitled "Creators of Legend", which portrays brutalities committed by the Communists in Occupied Estonia, and by delivering lectures based on his experiences as a prisoner in Russian prison camps and as a guerilla fighter; that on three occasions, in November 1963, July 1964 and September 1964, respectively, defendant defamed plaintiff by stating that "Errik Heine is a Communist" and "Errick Heine is a KGB Agent", the statements being understood as referring to plaintiff as a "Communist Secret Agent"; that the statements were untrue, were known to defendant to be untrue, were slanderous and defamatory per se, and were made maliciously. Plaintiff demands general and punitive damages.

In the original answer, filed in January 1965, defendant stated that he was National Commander of the Legion of Estonian Liberation, Inc. and admitted that on the three occasions specified in the complaint he had said, in the presence of others, that he "was in possession of responsible information received by him from an official agency of the United States Government to the effect that the plaintiff was a Soviet agent or collaborator and on that account should not receive the cooperation of the Legion and its branches during the plaintiff's tours of the United States." The answer asserted that the statements were true, and were made "only upon privileged occasions to persons privileged to receive them, and each such statement was made without express or actual malice in furtherance of the defendant's legitimate duties, responsibilities and offices"; that "the maintenance of the present action by the plaintiff is contrary to the interest and public policy of the United States"; and that "the defendant was privileged to speak of the plaintiff as he did, since the defendant was acting as an appropriate officer of the

Estonian Liberation movement". In the original answer defendant did not raise the defense of absolute privilege, because he was bound by a secrecy agreement[1] not to

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[1] The Secrecy Agreement, so headed, was executed in May 1963; more than five months before the first alleged defamatory statement. It reads as follows:

"1. I recognize that in connection with my confidential relationship with the Central Intelligence Agency (CIA) I will become apprised of information relating to the national defense and security and particularly information of this nature relating to intelligence sources, methods and operations, and specifically operations, sources, methods and operations, and specifically operations, sources, methods, personnel, fiscal data, or security measures. I realize that in addition to the actual information that comes into my posession because of my relationship with CIA it will be possible for me to deduce implications from suesh information. I understand that unlawful disclosure of this information or its implications could seriously jeopardize the national interest and security of the United States of America.

"2. I solemnly swear, without mental reservation or purpose of evasion, and in the absence of duress, as a citizen of the United States of America that I will never devulge, publish or reveal, by writing, word, conduct or other means, any information or its implications of the character set forth above, including the fact or content of my meeting with representatives of CIA, to any person unless I have been specifically authorized, in writing to do so by a representative of CIA. I understand that the term 'any person' includes, among others, friends, relatives, spouses, employers or representatives of any State or Federal Agency, excepting only CIA representatives who have been specifically referred to me by the representatives of that agency whom I have met on the occasion of signing this secrecy agreement.

"3. I understand that this agreement does not impose any restriction upon me or my employer with regard to information acquired by me or my employer in the regular conduct of business and not as a result of my relationship with CIA. The mere fact that such information is of interest to CIA does not subject it to the confidential treatment prescribed by this secrecy agreement.

"4. I fully realize that intention or negligent violation of this secrecy agreement may subject me to prosecution under the Espionage Laws of the United States of America (18 USC sec. 793 and 794)."

divulge such information unless specifically authorized to do so by a representative of the CIA, and because his counsel had been instructed by counsel for the CIA not to raise that defense.

In February 1965 defendant took plaintiff's deposition. In November 1965 plaintiff served on defendant 424 interrogatories, which defendant moved to strike on two grounds: (1) that their number was oppressive, and (2) that many of them inquired of privileged matter. See Rules 26(b) and 33, F. R. Civ. P. At the same time defendant filed a motion for summary judgment, based upon an affidavit of Richard Helms, then Deputy Director of Central Intelligence, that when defendant spoke concerning plaintiff on the occasion referred to in the complaint he was in possession of information furnished him by the CIA and was acting within the scope and course of his employment by that agency on behalf of the United States.

At a hearing on the motion and the exceptions then pending, the Court ruled: that defendant's original answer did not set up the defense of absolute privilege, but that leave should be granted him to file an amended answer asserting that defense;[2] that defendant should not be

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[2] Plaintiff contends that defendant waived or is estopped to assert the defense in this case because he did not raise it in his original answer, and took the deposition of plaintiff on the merits. Plaintiff therefore moved the Court to strike defendant's motion to amend his answer and assert the defense. Plaintiff's motion was overruled, and the Court adheres to its ruling, because it is quite clear from the testimony of defendant's counsel that defendant was refused permission by the CIA to raise the defense in his original answers, and that he was bound by his secrecy agreement, set out in note 1, above. The agency's reluctance to identify an employee's covert actvity is understandable; moreover, the delay of the CIA in granting permission to assert the defense should not be charged to defendant. Under the circumstances shown by the record there was no undue delay, bad faith or dilatory action chargeable to defendant, and no such prejudice to plaintiff as would prevent the allowance of the amendment. See Rule 15, F.R.Civ.P.

required to answer the 424 interrogatories, but that plaintiff should be allowed discovery, so far as permitted by law, on the issue of absolute privilege claimed by defendant; that a more detailed affidavit should be filed by the Deputy Director of Central Intelligence, or plaintiff should be allowed to proceed with reasonable discovery from him; and that if the Government wished to assert a privilege against disclosing state secrets, the United States Attorney should be present and such privilege should be formally asserted.

Thereafter a much more detailed affidavit by Helms, dated April 1, 1966, was filed. After stating his authority and familiarity with the facts the Deputy Director stated:

> "4. During the periods of time specified in paragraphs 5, 6, and 7 of the complaint, the defendant, Juri Raus, was employed as a highway research engineer for the Office of Research and Development, Bureau of Public Roads, United States Department of Commerce.
>
> "5. During the same periods of time, the defendant was the National Commander of the Legion of Estonian Liberation, Inc., and was familiar with Estonian emigre activities.
>
> "6. For a number of reasons, including his past history and his position as National Commander of the Legion of Estonian Liberation, the defendant has been a source to this Agency of foreign intelligence information pertaining inter alia to Soviet Estonia and to Estonian emigre activities in foreign countries as well as in the United States.
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> "7. The Central Intelligence Agency has employed the defendant from time to time—concurrently with his duties on behalf of the Bureau of Public Roads—to carry out specific assignments on behalf of the Agency. Defendant was so employed on those occasions specified in paragraphs 5, 6, and 7 of the complaint.

"8. On the occasions specified in paragraphs 5, 6, and 7 of the complaint, the defendant was furnished information concerning the plaintiff by the Central Intelligence Agency and was instructed to disseminate such information to members of the Legion so as to protect the integrity of the Agency's foreign intelligence sources. Accordingly, when Juri Raus spoke concerning the plaintiff on the occasions about which complaint is made, he was acting within the scope and course of his employment by the Agency on behalf of the United States.

"9. On May 29, 1963, prior to the occasions specified in paragraphs 5, 6, and 7 of the complaint, the defendant signed a Secrecy Agreement with the Agency, a copy of which is attached, which Agreement is still in full force and effect.

"10. After a personal review of the Agency's activities pertaining to Eerik Heine, I have reached the judgment on behalf of the Agency that it would be contrary to the security interests of the United States for any further information pertaining to the use and employment of Juri Raus by the Agency in connection with Eerik Heine to be disclosed, other than the disclosures already made in the defendant's answer, in my own affidavits, and the defendant's affidavits, which I have read.

"11. Acting pursuant to the authority lodged in the Director of Central Intelligence by virtue of the provisions of Title 50, United States Code, Sections 403d and 403g, and the implementing Regulations promulgated thereunder, I have determined that it would be contrary to the national interest and would further compromise the proper protection of intelligence sources and methods to disclose further information in regard to those material matters which the plaintiff has sought to have revealed through his pleadings. I

am herewith directing Juri Raus to make no further disclosures concerning his employment by the Agency or relating to this matter without specific authorization by proper officials of the Central Intelligence Agency."

Counsel for plaintiff still objected that the affidavit was not sufficiently specific and two clarifying affidavits by Helms were thereafter filed. The second such affidavit stated:

"1. In Paragraph 2 of my Affidavit dated April 22, 1966, which I executed as Deputy Director of Central Intelligence, I stated in part: 'The defendant was instructed to warn members of Estonian emigre groups that Eerik Heine was a dispatched Soviet intelligence operative, a KGB agent.'

"2. The context of that statement means, I intended by that statement to convey, and I now so state: The defendant, Juri Raus, was instructed by the Central Intelligence Agency to warn members of Estonian emigre groups that Eerik Heine was a dispatched Soviet intelligence operative, a KGB agent."

At a hearing on April 14, the Court had suggested that plaintiff might take the deposition of defendant or someone from the CIA or both, at a hearing with the Judge present, so that the Government's privilege might be claimed on a question by question basis, and immediate rulings obtained.

Such a hearing was held on April 28. At the beginning of that hearing a formal claim of privilege on behalf of the United States, made by Admiral W. F. Raborn, Director of Central Intelligence, was presented to the Court by Lawrence R. Houston, General Counsel of the CIA, and by Thomas J. Kenney, United States Attorney. The deposition of defendant was taken before the court; many of the objections asserted by counsel for the Government or by counsel for defendant on instructions from the General

Counsel of the CIA were sustained by the Court in view of the rules stated in *United States* v. *Reynolds,* 345 U.S. 1 (1953), but defendant's multiple employment by the Government was clarified.

Argument on defendant's motion for summary judgment was heard on May 13, and again on September 28, after the record had been supplemented by several letters and documents and final briefs had been filed by both sides.

II.

Defendant relies upon the defense of absolute privilege—that he had been instructed by the CIA to warn members of Estonian emigre groups that Eerik Heine was a dispatched Soviet intelligence operative, a KGB agent, and that when he made the statements alleged to be defamatory he was acting within the scope of his employment by an agency of the United States. Such an absolute privilege was recognized and sustained by the Supreme Court in *Barr* v. *Matteo,* 360 U.S. 564 (1959), and in *Howard* v. *Lyons,* 360 U.S. 593 (1959), following *Spalding* v. *Vilas,* 161 U.S. 483 (1896), and *Yaselli* v. *Goff,* 2 Cir., 12 F.2d 396 (1926), aff'd per curiam 275 U.S. 503 (1927).[3] It was recognized in *Garrison* v. *Louisiana,* 379 U.S. 64, 74 (1964), in a dictum by a justice who had dissented in *Barr* v. *Matteo* and *Howard* v. *Lyons.* The privilege has been repeatedly and recently recognized and sustained by the Courts of Appeals of many circuits. See e.g.; *Preble* v. *Johnson,* 10 Cir., 275 F.2d 275 (1960); *Sauber* v. *Gliedman,* 7 Cir., 283 F.2d 941 (1960), cert. den. 366 U.S. 906 (1961); *Ove Gustavsson Contracting Co.* v. *Ploete,* 2 Cir., 299 F.2d 655 (1962), cert. den. 374 U.S. 827 (1963); *Poss* v. *Licherman,* 2 Cir., 299 F.2d 358, cert. den. 370 U.S. 944 (1962); *Brownfield* v. *Lan-*

[3] The validity of the "claim of absolute privilege is governed by federal standards, to be formulated by the Courts in the absence of legislative action by Congress." Howard v. Lyons, 360 U.S. 593, 597 (1959).

don, 113 U.S. App. D.C. 248, 307 F.2d 389, cert. den. 371 U.S. 924 (1962); *Wozencraft* v. *Captiva,* 5 Cir., 314 F.2d 288 (1963); *Denman* v. *White,* 1 Cir., 316 F.2d 524 (1963); *Waymire* v. *Deneve,* 5 Cir., 333 F.2d 149 (1964); *Chafin* v. *Pratt,* 5 Cir., 359 F.2d 349 (1966). See also *DeLevay* v. *Richmond County School Board,* 4 Cir., 284 F.2d 340 (1960); *Holmes* v. *Eddy,* 4 Cir., 341 F.2d 477 (1965).

The reasons for the privilege were stated by Mr. Justice Harlan in *Barr* v. *Matteo,* 360 U.S. at 571, 572, as follows:

> " * * * It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand:
>
> " 'It does indeed go without saying that an official who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard

put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .

" 'The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers' and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . .' *Gregoire* v. *Biddle,* 177 F.2d 579, 581."

While recognizing the rule, as stated and applied in *Barr* v. *Matteo, supra,* counsel for plaintiff contend that defendant cannot assert the privilege for a number of reasons.

First, plaintiff contends the privilege does not apply to employees who exercise no discretion, as distinguished from officers or officials of the Government. This argument is not supported by reason or authority. In *Waymire* v. *Deneve,* 5 Cir., 333 F.2d 149 (1964), the privi-

lege was accorded to an agent of the Customs Bureau of the United States Treasury Department, and Wigmore on Evidence (McNaughton Revision, 1961), Vol. 8, § 2368, states: "A subordinate or ministerial official—i.e., one who acts under the orders of a superior official—is absolutely exempt from liability of the harm done by him is done solely in implicit obedience to an order lawful upon its face."

In *Barr* v. *Matteo* the question was whether the privilege should be accorded to an official who exercised some discretion, but was below cabinet rank. Mr. Justice Harlan said:

> "We do not think that the principle announced in *Vilas* [161 U.S. 483] can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." 360 U.S. 572, 573.

Later he said:

> " * * * That petitioner was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority." 360 U.S. 575.

These principles apply with even greater force to an employee who is acting under orders and has a duty to carry them out.

The test for determining the scope of the privilege, as stated in *Barr* v. *Matteo,* 360 U.S. at 575, is whether the action taken was within the outer perimeter of the defendant's line of duty.

Plaintiff contends that the test is not met in this case; that the statements made by defendant "were actions beyond the statutory power of the CIA", because 50 U.S.C.A. 403(d)(3) provides "that the Agency shall have no * * * internal security functions". He argues that departments and agencies other than the CIA, such as the Subversive Activities Control Board and the Federal Bureau of Investigation, must deal with security matters arising within the borders of the United States. It is clear, however, that one of the functions entrusted to the Central Intelligence Agency and its Director is "protecting intelligence sources and methods from unauthorized disclosure". 50 U.S.C.A. 403(d)(3). In his affidavit of April 1, 1966, quoted at length above, Helms stated that Raus was furnished information concerning the plaintiff by the CIA "and was instructed to disseminate such information to members of the Legion so as to protect the integrity of the Agency's foreign intelligence sources". In his final affidavit, also quoted above, Helms stated that defendant "was instructed by the Central Intelligence Agency to warn members of Estonian emigre groups that Eerik Heine was a dispatched Soviet intelligence operative, a KGB agent".

It is reasonable that emigre groups from nations behind the Iron Curtain would be a valuable source of intelligence information as to what goes on in their old homeland. The fact that the immediate intelligence source is located in the United States does not make it an "internal security function", over which the CIA has no authority.

The Court concludes that activities by the CIA to protect its foreign intelligence sources located in the United States are within the power granted by Congress to the CIA.[4]

III.

Plaintiff next argues that the motion for summary judgment should be denied on the ground that there is a genuine issue as to a material fact, namely, whether defendant was employed by the CIA and, if so, whether the statements which he made were in accordance with his instructions or went beyond his instructions. Since the amendment to Rule 56(e), F.R. Civ. P., effective July 1, 1963, it is now beyond dispute that "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or

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[4] At the hearing on May 13 the Court requested the General Counsel of the CIA to submit a statement as to the legal authority of the CIA to engage in activities within the United States with respect to foreign intelligence sources. In response to that request, the General Counsel prepared an affidavit which incorporates by reference particular paragraphs of a document which is classified "secret" and which cannot be declassified for the purposes of this case. For that reason, the General Counsel requested the Department of Justice to submit to the Court under seal, for in camera inspection, the identification of the document and the two pertinent paragraphs, properly certified. The Agency stated that it did not object to the Court making the classified excerpts available to the attorneys for plaintiff and defendant respectively for inspection but not for copying, and stated that any of the attorneys would be granted access, upon request, to the two pertinent excerpts at the office of the General Counsel, with the understanding that the attorneys would not disclose the excerpts thus made available to them. The attorneys for plaintiff refused to examine the excerpts under those conditions, stating that they would not look at anything they could not communicate to their client. The Court has examined the papers in camera; they are not inconsistent with the affidavits of Helms, but the Court has not considered the classified excerpts in reaching its decision herein.

as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." That was always the rule in the Fourth Circuit. *Bond Distributing Co.* v. *Carling Brewing Company,* D. Md., 32 F.R.D. 409, aff'd. 4 Cir., 325 F.2d 158 (1963). Upon examination, the claimed conflicts in the affidavits and depositions do not materially affect the facts upon which the defense of absolute privilege is based. The most important conflict claimed by plaintiff is whether defendant was employed by the Bureau of Public Roads or by the CIA. However, it appears quite plainly from paragraphs 4, 6, 7 and 8 of the second affidavit of Helms, quoted above, and from the deposition of defendant, that he was employed both by the Bureau of Public Roads and by the CIA, for different purposes, and that he was acting in the course of his employment by the CIA when he made the statements in question. Plaintiff does not dispute that defendant was employed by the United States.[5]

There is more force in plaintiff's argument that he has been prevented from discovering possibly conflicting evidence by the Government's assertion of its privilege not to disclose the operations of the CIA. The Court has been anxious that plaintiff should have the opportunity to discover whatever facts he is legally entitled to discover under the rules stated in United States v. Reynolds, 345 U.S. 1 (1953), and has accorded plaintiff that opportunity,

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[5] Plaintiff contends that some of the statements in Helms' affidavits are conclusions rather than facts. No doubt some of the statements are conclusions, but the facts contained in the affidavits support the conclusions, which are further supported by the deposition of the defendant taken in open court and the exhibits which have been filed. The conclusions are not contradicted by any evidence or other material before the Court except the bare allegations of plaintiff's complaint, which are not sufficient to overcome the facts contained in the affidavits and other evidence. Rule 56(e).

through the deposition of defendant taken in open court, and by requiring such clarification and amplification of the original affidavits made by Helms as the Agency determined were consistent with the security interests committed to its care.

Deputy Director Helms, in his affidavit of April 1, 1966, stated "that it would be contrary to the security interests of the United States for any further information pertaining to the use and employment of Juri Raus by the Agency in connection with Eerik Heine to be disclosed, other than the disclosures already made in the defendant's answer, in my own affidavits, and the defendant's affidavits * * *."

It is clear, therefore, that if Raus makes further disclosures without the approval of the Agency, he would not only violate the secrecy agreement, see note 1, above, but might also violate the statute prohibiting unlawful disclosure of confidential information respecting the national defense. See 18 U.S.C.A. 793, 794, 798 and 1905.

The privilege of the Government which was recognized and sustained in *Reynolds* is reenforced in this case by the provisions of the applicable statutes. 50 U.S.C.A. 403(d)(3) provides, in pertinent part:

> "The Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

In conjunction with this provision, 50 U.S.C.A. 403g provides:

> "In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of section 654 of Title 5, and the provisions of any other law which

> require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency * * *"

See also Executive Order No. 10501, 18 F.R. 7049 (1953), as amended by Executive Order No. 10816, 24 F.R. 3777 (1959), set out after 50 U.S.C. 401 (Cum. Supp. 1965).

Plaintiff argues that the affidavits and testimony in support of the motion for summary judgment do not present admissible evidence because they were not subject to cross-examination and were not based on personal knowledge. The deposition of defendant, taken by counsel for plaintiff in open court, was itself cross-examination, and was permitted to the full extent authorized by *United States* v. *Reynolds*. Such testimony as he was allowed to give was based on his personal knowledge.

The affidavits with respect to the instructions given defendant were made by Helms, then Deputy Director of Central Intelligence, rather than by the person who gave defendant the instructions. The decision not to disclose the name of that person was made by the appropriate official of the CIA, in the exercise of the authority granted him by the applicable statutes and executive orders. That such disclosure might be damaging to the intelligence sources and methods of the Agency was asserted by Helms in paragraphs 10 and 11 of his affidavit, and by Admiral Raborn, then Director of Central Intelligence, in the Claim of Privilege which he filed on behalf of the United States.

It cannot be denied that the combination of (1) the privilege against liability for defamation asserted by defendant and (2) the privilege against discovery of the secrets of the CIA asserted by the Government places plaintiff in a very difficult position. But the fact that the two privileges operate in concert in the instant case does not affect their validity.

The provisions of Rule 56(e), F. R. Civ. P., requiring affidavits to be made on personal knowledge and to set

forth facts which would be admissible in evidence, must be read in connection with the applicable statutes and executive order, particularly 50 U.S.C.A. 403(d)(3) and 403g quoted and discussed above in this section of the opinion. To require that the affidavit be signed by the person who personally instructed Raus would force the CIA to reveal the names of one or more of its personnel in contravention of section 403g, quoted above.

A trial would not resolve the question of the truth or falsity of the charges, because the Court would still be required to recognize the privilege asserted by the United States. There is no reason to believe that the Agency's position will be altered by any further attempts at discovery by plaintiff. The dilemma which would be presented at the trial would be the some dilemma which is presented now—whether the fact that defendant is precluded from testifying to facts and from calling witnesses who might establish the truth of the alleged defamatory remarks (a) should require defendant to stand weaponless before his adversary, or (b) should deny plaintiff the opportunity to attempt to vindicate himself in court.[6] No way to avoid choosing between two evils has been suggested or discovered. The choice is dictated by the passage from Judge Learned Hand's opinion in *Gregoire* v. *Biddle,* 177 P.2d 579, 581, which is set out in full in section II of this opinion. The principles so clearly stated by Judge Hand and applied by the Supreme Court in *Barr* v. *Matteo* and *Howard* v. *Lyons,* require that summary judgment be entered for defendant herein.

/s/ Roszel C. Thomsen
Chief Judge, U.S. District Court

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[6] Plaintiff has embraced the opportunity to bring his case to the attention of the public by elaborate statements to the press in this country and in Canada. The propriety of the way the CIA operates has been canvassed in a series of articles in the New York Times and other leading newspapers, and has been investigated by the Congress during the past months.

APPENDIX B

(1) Rule 56(e), F.R.C.P.

"(e) Form of Affidavits; Further Testimony; Defense Required. Supported and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. As amended Jan. 21, 1963, eff. July 1, 1963."

Rule 56(f), F.R.C.P.

"(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

(2) 50 U.S.C. § 403(d)(3)

"§ 403. Central Intelligence Agency—(a) Establishment; Director; appointment and compensation

There is established under the National Security Council a Central Intelligence Agency with a Director of Central

Intelligence, who shall be the head thereof. The Director shall be appointed by the President, by and with the advice and consent of the Senate, from among the commissioned officers of the armed services or from among individuals in civilian life. The Director shall receive basic compensation at the rate of $16,000 per annum.

Powers and duties

(d) For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the direction of the National Security Council—

. . . (3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: *Provided,* That the Agency shall have no police, subpena, law-enforcement powers, or internal-security functions: *Provided further,* That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: *And provided further,* That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.

50 U.S.C. § 403g. Same; protection of nature of Agency's functions

In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of section 654 of Title 5, and the provisions of any other law which require the publication or dis-

closure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency: *Provided,* That in furtherance of this section, the Director of the Bureau of the Budget shall make no reports to the Congress in connection with the Agency under section 947(b) of Title 5. June 20, 1949, c. 227, § 7, 63 Stat. 211.

SECURITY HR 10-20

20. Protection and Disclosure of Information

a. AUTHORITY. Under the National Security Act of 1947 and the Central Intelligence Agency of 1949, and under direction of the National Security Council, the Director of Central Intelligence is responsible for protecting intelligence sources and methods from unauthorized disclosure.

b. PROTECTION INFORMATION. The problem of determining what information relates to the protection of intelligence sources and methods is of such complexity that no final determination can be made in regard to any single piece of information within the Agency or the other intelligence components except at the Director's level. Under his responsibility for protection of such information there have been established overall policies and detailed procedures for the appropriate dissemination of information and for its protection in the executive branch of the Government. Every request for information outside of the system designed to serve the executive branch becomes a special problem requiring specific determination by or on behalf of the Director. Therefore all files, documents, records, and information (whether or not reduced to writing) in the offices of the Central Intelligence Agency, including the several field offices, or acquired by any person as a result of service with or on behalf of the Agency, are to be regarded in the first instance as protected information.

c. POLICY. All persons are hereby prohibited from disclosing or using protected information for any purpose other than the performance of duties for or on behalf of

the Agency, unless the Director of Central Intelligence or his designee has authorized the disclosure or use as not being contrary to the public interest. When deemed advisable by the Director, requests for protected information will be referred to the National Security Council for a decision on disclosure.

d. SUBPENA FOR PROTECTED INFORMATION

(1) Any person who is served with a subpena requiring the disclosure of protected information to a court or the Congress shall promptly inform the General Counsel of the service of the subpena, the nature of the information sought, and any circumstances which may bear upon the desirability of making available the information, in order that the General Counsel may advise the Director. Any action in response to the subpena shall be taken only in accordance with advice of the General Counsel. Disclosure may be authorized only by the Director or Deputy Director of Central Intelligence.

(2) If circumstances make it necessary for the Director to decline in the public interest to furnish the information, the person on whom the subpena is served (acting in accordance with advice of the General Counsel) or the General Counsel or his designee will appear in answer thereto and respectfully state that he is complying with specific instructions of the Director of Central Intelligence in refusing to furnish the information requested.

Certified a true copy of Central Intelligence Agency Regulation HR 10-20, effective 29 August 1952, renumbered 1 April 1961.

LOUIS G. CARRICO
Louis G. Carrico
CIA Records Administration
Officer